

Persons with Disabilities and the Meaning of Constitutional Equal Protection

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This Article focuses on the constitutional rights of persons with severe disabilities, arguing that the most severely disabled persons should not always be treated the same way as less severely disabled persons—just as severely and slightly injured tort plaintiffs should not receive equal damage awards. Professor Wright argues that federal constitutional and statutory law does not provide equal protection to persons with severe disabilities. A disabled person does not receive equal protection of the laws by receipt of just any government payment; the government payment must correspond to the circumstances the disabled person is in and the depth of his or her basic need or deprivation. Professor Wright concludes that, when establishing these government payment amounts, standardized but reasonably sensitive categories should be developed, thereby establishing a balance between a purely individualized standard and a crude distinction between severe and non-severe disabilities.

"Perhaps because everyone can imagine having been switched in the cradle, it is easy to think, about the members of a deprived class, 'There but for the grace of God go I.' But one's natural talents are not so easily switched, and that hinders the moral imagination."

—Thomas Nagel**

I. INTRODUCTION

Our attitudes toward persons with disabilities are complex.¹ Insofar as public

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** THOMAS NAGEL, EQUALITY AND PARTIALITY 113 (1991). See also Anita Silvers, "Defective" Agents: Equality, Difference and the Tyranny of the Normal, 25 J. SOC. PHIL. 154, 158 (1994) ("[W]e cannot seem to operationalize impartial moral judgment when it comes to imagining ourselves in a disabled person's place.").

¹ See Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1003 (1998). For a concise literary example, consider the following sample of some reactions to the four year old Quasimodo:

"What is the world coming to," said Jehanne, "if that's the way they make children nowadays?"

"I don't know much about children," resumed Agnes, "but it must be a sin to look at this

attitudes are embodied in federal constitutional and statutory law, our general sentiment is one of limited benevolence. Limited benevolence toward persons with disabilities is a response with which, in contemporary parlance, we are comfortable. The argument below, however, is that our comfort does not set the bounds to what may be required of us as a matter of constitutional equal protection. The current overall package of government programs and benefits, we shall argue, denies severely disabled persons the equal protection of the laws, even if we do not think of such persons as a classic discrete and insular minority. To receive some special government payment is not necessarily to receive the equal protection of the laws, even if other groups receive no corresponding payment at all. This depends, as we shall see, on the circumstances in which the parties blamelessly find themselves, and the depth of their basic need or deprivation.

We will focus in particular on persons with the most severe disabilities. Plainly, not all disabilities are equal in their effects, and not all disabilities are treated equally by the public. For our purposes, the more severe disabilities, generally, are those that most adversely affect typical basic life activities, from birth or at least from an early age, and that are likely permanent in their effects. These effects certainly need not be thought of as purely medical or physiological; they may well better be thought of as a matter of how society responds, fails to respond, or places obstacles in the path of such persons. Many persons who are considered disabled would not be so considered if our physical and social institutions were otherwise structured. Disability is largely a matter of what is not statistically common, and therefore not catered to.

While the severity of a disability is thus partly a matter of impairment of functioning and crucially of public response, we should also bear in mind the burden of uninsurable financial costs that may be involved. Some disabilities involve expensive medical treatment, therapy, or other accommodation, but other

one."

"It's not a child at all, Agnes. It's a deformed ape," observed Gauchère.

"It's a miracle," said Henrietta la Gaultière.

VICTOR HUGO, *THE HUNCHBACK OF NOTRE DAME* 140 (Walter J. Cobb & Phyllis La Farge trans., Penguin Signet ed. 1965). For an even more concise example of societal ambivalence toward persons with disabilities, consider the following incident that occurred two months after the effective date of the public accommodations section of the Americans with Disabilities Act: "[J]ournalist John Hockenberry . . . had paid \$60 for his ticket and had checked in advance that the theater was accessible. But when he showed up, the theater manager refused to help seat him. 'You are a fire hazard, sir,' the manager complained." JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 333 (1994). Actually, it is difficult to imagine a more concise example of the combination of superficial politeness and objectification. Of course, these attitudes do not begin to exhaust the range of public attitudes toward the disabled, as we shall see further below in connection with our discussion of *Carolene Products* prejudice, *infra* Part III.

disabilities do not. In any event, there is surely a rough consensus on which forms of disability are more and less severe. For some purposes, what people think of as a severe disability and what "really" is a severe disability may be taken to be the same.

Beyond this, we will not further define the precise bounds of the category of severe disability. It is more important to establish some basic constitutional arguments, leaving the details to the workings of the political and judicial processes. Certainly, there will not be much difference between those who count as just barely severely disabled and those who are just barely not severely disabled. Those in the latter category will still receive some sorts of standard benefits under federal and state statutes. This kind of boundary line problem exists whenever we more traditionally distinguish between those who count as disabled for some purpose and those who do not. Ordinarily, we do not refuse to establish benefit programs for persons with disabilities on the grounds that it would be hard to decide marginal classification cases. Focusing on the most severe disabilities is important. The most severely disabled persons should not always be constitutionally treated in exactly the same way as the least severely disabled, any more than severely and slightly injured tort plaintiffs should receive equal damages awards, or than every person whose property is taken by the state should receive an equal condemnation award. For some political purposes, it is reasonable to adopt a broad, inclusive definition of disability, and to assume that all disabled persons should be treated alike. It is easier to persuade legislators to make public venues more broadly accessible if such a rule is promoted by a large and broad coalition. Breadth and inclusiveness may thus enhance overall political influence through sheer numbers and coalition building. But it is also important to recognize the costs of a broad approach to disability. The greater the number of persons who are to be eligible for a given benefit, the more expensive it will be to fund the benefit in question. As government programs with standard, uniform benefit levels expand, it will be decreasingly likely that the benefit levels will fairly address the circumstances of the most severely disabled persons.² If, for example, the same benefits are to be accorded to all disabled persons, it is more likely that the worst off will be undercompensated than that all other disabled persons will be overcompensated.³

This is not to suggest that persons with less severe disabilities deserve only minimal benefits, or that any particular government program is currently adequate even for their purposes. Instead, the point is that persons with the most severe disabilities should not be treated as though their disabilities were only slight or moderate in severity. Such treatment can rise to the level of a constitutional equal

² See Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 364 (1996) (arguing that broad definitions of disability tend to drive benefit levels down toward general poverty relief program levels).

³ See *id.*

protection violation. The fact that some sort of special benefit is being paid does not necessarily establish that the equal protection of the laws is being respected. We shall argue that persons with severe disabilities are denied the equal protection of the law, ironically, even if they receive some benefits not received by non-disabled persons.

It is entirely possible that most non-disabled persons simply do not care to recognize any expensive equal protection rights running in favor of the most severely disabled persons. This might be for worthy reasons, or for reasons based in self-indulgence and a culture of consumption. This rights extension would involve some further transfer of resources from those without disabilities, or from the well off generally, to those with severe disabilities. This disinclination to pay may well be reflected by the accepted constitutional law and the judicial system itself. But the mere disinclination to recognize a right does not undermine the logic of that right. It is logically possible for the public and the judicial system to unjustly refuse to recognize a right. There is a logic of constitutional equal protection that remains even if we do not care to admit all the implications of that logic. By way of analogy, there would be a sense in which a racial minority's equal protection rights would be violated by, let us say, the preventive detention of all members of that minority, even if most voters and most judges declared otherwise.⁴ We should neither deny the reality nor the injustice of arbitrary treatment. If the equal protection rights of the most severely disabled persons are ever to be fully recognized, we must start by thinking about the contours of those rights. Recognizing the scope of those rights in the realm of argument is only a first step, but surely a necessary step, in eventually recognizing the scope of such rights in practice.

It is also possible—indeed, it is certain—that some of the most severely disabled persons themselves would not seek, or believe themselves to deserve, equal protection rights entitling them to more substantial resource transfers.⁵ They may deny more broadly the meaningfulness or validity of the category of severe disability, at least as it is typically used. Some such persons ask only that the public recognize their real capacities and not place barriers in their path. Some deny that it would be better to be what the broader society considers non-disabled, and say that if there were some magical “cure” for their disability, they would refuse to take it.⁶

⁴ Cf. *Korematsu v. United States*, 323 U.S. 214 (1944) (involving the imprisonment of Japanese-Americans during World War II for no other reason than their ancestry).

⁵ See, e.g., PETER SINGER, *PRACTICAL ETHICS* 51–54 (2d ed. 1993).

⁶ See, e.g., Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245, 264 (1994) (reviewing SHAPIRO, *supra* note 1). For a cogent exposition of the non-inferiority of disabled persons, see, for example, Anita Silvers, “Defective” Agents: *Equality, Difference, and the Tyranny of the Normal*, 25 J. SOC. PHIL. 154, 156, 158 (1994).

We are certainly not in any position to second guess such judgments. Disability should obviously not be considered a source of shame, indignity, embarrassment, or as a mark of inferiority. We can imagine cultures that accommodate what we would think of as disability without much ceremony, or that treat what we would think of as disability as a sign of divine favor, if not of divinity itself. We can imagine cultures that associate blindness with wisdom, and that highly regard wisdom. A severe disability may be thought of as involving a unique or different life path, and certainly one that is valuable and well worth taking. Non-disabled persons may well not appreciate what it is like to be severely disabled, and may in some cases grossly underestimate the value and satisfaction of a life involving severe disability. But it is fair to note that a severely disabled person who prefers disability already has an established identity as a disabled person, even if this identity is a purely social construct, just as non-disabled persons have established identities in which disability and non-disability is often less salient.⁷ To say that one would take an entirely hypothetical but actually non-existent magical "cure" is thus in a sense to turn one's back on one's own identity, for very little real payoff.

There is no available standpoint that is rigorously neutral as between disability and non-disability. We cannot easily abstract away from our disability or lack thereof. This would require enormous imaginative power. We can, however, at least say that there is some evidence that most disabled persons do not seem to take the view that such a cure would not be worth taking.⁸ To pursue the matter, we can at least do thought experiments about disabilities and fair compensation. And we can try in particular to pry away the effects of our established identities by thinking hypothetically about children.

Consider, for example, the case of a physiologically normal, very young child who has, for the sake of simplicity, no relatives with any interest in the matter. The child has, we assume, not much of a conscious self-image, has not yet psychologically "invested" or "planned" significantly, and has not yet grasped any distinction between disability and non-disability. The child thus has not yet developed a relevant identity. Let us then assume, however gruesomely, that the child is anesthetized and has her spine deliberately and pointlessly crushed by a bystander, permanently denying her any use of her arms or legs. We must then ask only whether we would consider that act of the bystander to be neither immoral nor tortious, beyond the technical non-consensual touching and any unpaid medical bills. Has the child merely been taken down one path at a fork in life's road? Has she merely had some choices precluded, and some other choices opened up? Would a figure of about six hundred dollars a month strike us as full and proper

⁷ For a racial analogue, see, for example, Thomas Ross, *Being White*, 46 BUFF. L. REV. 257, 257 (1998) (reviewing IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996)).

⁸ See *supra* notes 5–6.

compensation? We shall, for purposes of this article, instead assume that the child has been significantly morally wronged and legally injured, beyond being deprived of the choice as to whether she later wishes to disable herself or not.

This certainly does not suggest that any disabled person should be considered "inferior" as a person. It is quite the contrary. If disabled persons were inferior, they would on standard analyses deserve inferior treatment. However ironical as it may seem, a claim to equal protection presupposes that one is in a crucial sense already equal to one's fellow persons. We instead argue for, at a minimum, the moral equality of disabled persons. It is on the basis of this equality that disabled persons deserve the genuinely equal protection of the laws. Of course, a person with severe disabilities should be entitled to freely refuse the alleged benefits of a redistributive transfer program of the sort discussed below.

We shall assume specifically that once the government chooses to somehow address persons with severe disabilities, whether benevolently or unthinkingly, it must do so in a manner fully consistent with the underlying logic of the equal protection clause.⁹ Our basic technique will be to first briefly illustrate the nature of federal statutory programs addressing persons with disabilities in general.¹⁰ Then, at somewhat greater length, we will explore the currently established constitutional law doctrine and then the deeper underlying logic of equal protection in this context.¹¹ We will conclude that while the disabled, and even the most severely disabled, do not qualify for suspect classification status, current federal programs nonetheless fall short of the requirements of equal protection for persons with severe disabilities.

This is not to suggest, given the current public mood, that there is much realistic likelihood that persons with severe disabilities are soon to receive the genuinely equal protection of the laws as outlined below. Sheer self-interest of the majority probably precludes this. But this is not the point. It is important to document the constitutional treatment that the most severely disabled persons logically deserve, and to compare that level of treatment with that actually accorded. This, at the very least, undercuts the hypocrisy and complacency with which we commonly celebrate our commitment to equal protection. It exposes the gap between our collective self-image and our collective self-indulgence. There is perhaps even a certain dignity in

⁹ Some of the considerations relied upon below, such as those of freedom and autonomy, may well not apply, at least in the same way, to the most severely cognitively or otherwise mentally disabled persons. *See, e.g.,* Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 396. Other considerations, such as the financial cost of medical and other sorts of care, may apply in such cases. To the extent that persons with severe cognitive disabilities do not fall within the logic and scope of the arguments below, the equal protection rights of such persons may be correspondingly affected.

¹⁰ *See infra* Part II.

¹¹ *See infra* Parts III-IV.

admitting that we pretend to constitutional standards we do not genuinely endeavor to uphold. This Article can, at the very least, contribute to a more realistic, if less collectively flattering, understanding of our constitutional law.

We commonly think, in particular, of our constitutional system as being based on the consent of the governed, but it is absurd to claim that we have collectively decided, on a carefully considered basis, that severely disabled persons would freely and voluntarily consent to a regime affording them only our current minimalist constitutional protections. There is no reason to believe that a discussion between persons with and without severe disabilities would, on the basis of genuinely free and voluntary agreement, result in the general endorsement of our current equal protection system of only limited benevolence toward persons with undeserved severe disabilities.

II. FEDERAL STATUTORY RESPONSES TO DISABILITY

A number of federal statutes directly address the rights and opportunities of persons with disabilities.¹² We can refer, briefly, to some of the most significant. These few are certainly significant enough in themselves, and generally illustrative of the rest. Consider first the Individuals with Disabilities Education Act, formerly known as the Education for All Handicapped Children Act.¹³ The Supreme Court has authoritatively declared that this statute “imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education”¹⁴ The Court has further declared in particular that the Act does not reflect any “congressional intent to achieve strict equality of opportunity or services,”¹⁵ or to maximize each student’s potential commensurate with the opportunities afforded other children.¹⁶ As thus interpreted, the statute falls within what we have referred to as the category of limited governmental benevolence. Virtually by its own admission, the statute does not even attempt to ensure equal opportunity, or the genuinely equal protection of the laws.

¹² See, e.g., Individuals with Disabilities Education Act (formerly known as the Education for All Handicapped Children Act of 1975), 20 U.S.C. §§ 1400–1487 (1988 & Supp. 1997); Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797 (1994 & Supp. 1996); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1994); Supplemental Security Income program embodied in the Social Security Act, 42 U.S.C. §§ 1381–1383 (1994 & Supp. 1996); see also Diller, *supra* note 1, at 1005.

¹³ See 20 U.S.C.A. §§ 1400–1487 (1988 & Supp. 1997); *Cleveland Heights-University Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 396 (6th Cir. 1998).

¹⁴ *Board of Educ. v. Rowley*, 458 U.S. 176, 195 (1982).

¹⁵ *Id.* at 198.

¹⁶ See *id.*

The Americans with Disabilities Act (ADA),¹⁷ which is typically interpreted in accordance with the Rehabilitation Act of 1973,¹⁸ is certainly an enactment of great breadth and significance. But in the important context of employment, for example, the ADA does not require anything remotely like affirmative action or government subsidies,¹⁹ and requires only "reasonable" accommodation of persons with disabilities, subject to an "undue hardship" constraint.²⁰ An undue hardship under the ADA involves merely any "significant difficulty or expense."²¹ In the absence of any relevant government subsidy, this limitation on the costs statutorily imposed upon private employers who may be vulnerable to market competitors is hardly surprising. But this limitation built into the ADA practically ensures that those among the most severely disabled persons who do aspire to employment will receive only minimal benefit from the employment provisions of the ADA.

It seems almost inevitable that within the broad category of persons with disabilities, the employment provisions of the ADA will generally provide help in a degree inversely correlated with the applicant's severity of disability. Surely, one would imagine, the least disabled will typically gain the most, and the most disabled the least.²² Severely disabled candidates must still prove that they are the best qualified for the job, with no more than rather minimally expensive

¹⁷ See 42 U.S.C. §§ 12101-12213 (1994).

¹⁸ See 29 U.S.C. §§ 701-797 (1994 & Supp. 1996). For the general correspondence in interpretation, see, for example, *Andrews v. Ohio*, 104 F.3d 803, 806-07 (6th Cir. 1997); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 n.2 (8th Cir. 1995). In turn, the federal statutes may guide or limit the interpretation of state statutes. See, e.g., *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 14 (1st Cir. 1997) ("[I]nterpretation of the ADA and of the Maine Human Rights Act have proceeded hand in hand.").

¹⁹ See Bonnie O'Day, *Economics Versus Civil Rights*, 3 CORNELL J.L. & PUB. POL'Y 294-300 (1994).

²⁰ See, e.g., *Willis v. Conopco, Inc.*, 108 F.3d 282, 284-86 (11th Cir. 1997) (per curiam); *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (emphasizing the cost-benefit analysis to be performed at the stage of both the reasonableness of the accommodation and at the stage of alleged undue hardship); *Borkowski v. Valley Central Sch. Dist.*, 63 F.3d 131, 136-39 (2d Cir. 1995) (analyzing the terms "reasonable accommodation" and "undue hardship" under the Rehabilitation Act of 1973). It should also be borne in mind that the ADA does not require the hiring of qualified disabled applicants over equally qualified non-disabled applicants. See Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 376 (1997). Contrast as well the idea of a federal civil rights statute permitting the exclusion or non-hiring of racial minorities or women if admitting or hiring such persons would pose an "undue hardship" to the employer. See David Wasserman, *Impairment, Disadvantage, and Equality: A Reply to Anita Silvers*, 25 J. SOC. PHIL. 181, 186 (1994).

²¹ *Vande Zande*, 44 F.3d at 543 (quoting the ADA, 42 U.S.C. § 12111(10)(A) (1994)).

²² See O'Day, *supra* note 19, at 294; David Wasserman, *Disability, Discrimination, and Fairness*, 13 PHIL. & PUB. POL'Y 7, 11 (1993).

accommodation. Of course, this general tendency would hardly be exceptionless. One can envision, for example, a situation in which a relatively severely disabled paraplegic can be accommodated at a lower overall cost than, say, a less severely disabled person who must for a time take unpredictable job absences.²³ But this pattern would not be the most common. The ADA may well help disabled job seekers in general, but it quite likely will perversely and regressively expand the inequalities of opportunity between the least disabled and most severely disabled.

Even if it were plausible that the most severely disabled job applicants benefited from the ADA as much as less severely disabled job applicants, we would still need to place this in perspective. It is clear that even after the enactment of the ADA, most substantially disabled adults do not work in, or actively seek employment in, competitive market employment,²⁴ and thus cannot possibly benefit from the modest employment provisions of the ADA. A statute that leaves severely disabled persons as still perceived as practically "unemployable," if perhaps somewhat less so than before the enactment of the statute, hardly ensures the equal protection of the laws.

The ADA's employment provisions can thus be seen as falling within the category of merely limited benevolence. Can the same thing be said, though, about explicit resource transfer programs such as Supplemental Security Income (SSI) available to qualified persons with disabilities?²⁵ The SSI program is intended to assist otherwise qualified persons "who have attained age 65 or are blind or disabled."²⁶ Approximately 100,000 of the claims adjudicated annually are in particular for children with disabilities.²⁷

The scope of coverage of SSI may be broad, but its substantive ambitions are

²³ It is also likely that some persons whose disabilities are relatively mild or intermittent and not easily detected by employers may choose to conceal their condition, thus not asking for any accommodation under the ADA.

²⁴ See Peter David Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853, 913 (1994) ("[C]urrent estimates of unemployment levels for persons with disabilities range from fifty to ninety percent."). Also revealing is that "[o]f the approximately 14,000 Title I claims filed in 1993, roughly thirty-one percent involved a back and spine related disability, with less than one percent of all claims involving mental retardation." *Id.* at 921.

²⁵ See 42 U.S.C. §§ 1381-1383 (1994 & Supp. 1996).

²⁶ *Sullivan v. Zebley*, 493 U.S. 521, 524 (1990) (quoting 42 U.S.C. § 1381). The test for disability for these purposes tracks the standard Social Security disability insurance program requirements. See *id.*

²⁷ See *id.*; see also Elizabeth J. Jameson & Stephen C. King, *The Failure of the Federal Government to Care for Disabled Children: A Critical Analysis of the Supplemental Security Income Program*, 20 COLUM. HUM. RTS. L. REV. 309, 316 (1989) (stating that there are 290,256 disabled poor children in the SSI program as of 1988).

otherwise starkly limited. The focus is on providing a “guaranteed”²⁸ income to those who qualify, but the level that is to be guaranteed is characterized as only of minimal decency²⁹ or minimal subsistence.³⁰ In order to qualify, claimants must not exceed certain maximum income and resource limitations, with the modest maximum benefits being reduced if other sources of income and resources are available.³¹

The maximum available benefits may doubtless be vital or indispensable to their recipients, but this does not mean that the benefits are properly characterized as anything other than “small.”³² After all, to protect someone’s most elemental interests is not necessarily to provide that person with the equal protection of the laws. The maximum SSI benefits, apart from any reductions, would by itself³³ typically fall short even of realistic subsistence levels. The maximum SSI benefit level, for a single individual with no countable income, whether moderately or severely disabled, was recently set at \$484 per month.³⁴ This figure has modestly risen over time from somewhat lower levels.³⁵ The reader is invited to compare the

²⁸ *Zebley*, 493 U.S. at 524.

²⁹ See *Doyle v. Shalala*, 62 F.3d 740, 744 (5th Cir. 1995) (quoting *Jones v. Shalala*, 5 F.3d 447, 450 (9th Cir. 1993)).

³⁰ See *Doyle*, 62 F.3d at 744 (quoting *Jones*, 5 F.3d at 451–52).

³¹ See, e.g., Richard J. Bonnie, *Work Disability and the Fabric of Mental Health Law: An Introduction*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW* 1, 2 (Richard J. Bonnie & John Monahan eds., 1997) (explaining that the SSI program is means-tested, as opposed to the insurance-oriented higher disability benefits for covered workers which is not means-tested); *Ellis v. Apfel*, 147 F.3d 139, 141 (2d Cir. 1998) (citing *Gordon v. Shalala*, 55 F.3d 101, 101 (2d Cir. 1995)); *Doyle*, 62 F.3d at 742. The income limitations are complex. See, e.g., *Ellis*, 147 F.3d at 141 (citing 20 C.F.R. § 416.1102 (1997)); *Doyle*, 62 F.3d at 742 n.1. The maximum resource limits are also quite stringent. See 42 U.S.C. § 1382(a)–(h) (1994 & Supp. 1996); 20 C.F.R. § 416.2020–416.2099 (1998).

³² Jameson & King, *supra* note 27, at 314.

³³ The SSI cash benefit by itself may be misleading, as eligibility under the SSI program may trigger eligibility for other, perhaps more valuable benefits. See *Vaughn v. Sullivan*, 83 F.3d 907, 909 (7th Cir. 1996). SSI eligibility may thus trigger Medicaid eligibility, and Medicaid eligibility may certainly cost the provider more than the SSI benefit. See *id.* at 909.

³⁴ See 1997 Social Security Handbook § 2171 (13th ed. 1997) (available at www.ssa.gov/OP_Home/handbook/ssa-hbk.htm).

³⁵ See, e.g., *Simmons v. Chater*, 104 F.3d 168, 169 (8th Cir. 1997) (“As of the date of Simmons’ hearing, the statutory income limit for an SSI recipient was \$466 per month.”); Andrea Hyatt, *Legislation Allowing Disabled Beneficiaries to Collect SSI: Providing Disabled Americans the American Dream of Comfort*, 6 WIDENER J. PUB. L. 1, 5 (1996) (stating the maximum benefit level at \$458 per month); *Stokely v. Apfel*, 56 Soc. Sec. Rep. Ser. 673 In.2 (S.D.N.Y. 1998) (stating that the benefits under SSI are \$556 per month; *Johnson v. Wing*, 12 F. Supp. 2d 311, 313 (S.D.N.Y. 1988) (stating that claimant received \$494 federal SSI grant, plus \$86 state supplementation, and \$42 in food stamps, all on a monthly basis).

\$484 figure with a reasonable minimal budget for rent, utilities, food, clothing, necessary services, and transportation, under the typical circumstances of the most severely disabled persons.

The reader is then further invited to consider a free and voluntary choice between a life, from birth or an early age, of severe disability but with current federal programs and benefit levels, and, in the alternative, a life with no such disability and no associated such program benefits. Can most of us say, with any sincerity, that we would be indifferent as between these two possibilities, given the governmental benefits that offset the various financial and stigmatic costs and injuries imposed on the severely disabled? Any suggestion that the governmental transfer programs are much more than tokenistic, as opposed to genuinely and deeply equal protection-oriented, is simply implausible, as we shall see in Parts III and IV below.

III. DISABILITY AND DISCRETE AND INSULAR MINORITIES

Under the current constitutional case law, the income and resource limits and the benefit levels under SSI are generally protected from serious equal protection scrutiny. As one court has observed, "[t]he classifications used . . . in determining the level of SSI benefits to which an SSI recipient is entitled are subject to rational basis review."³⁶ This minimum judicial scrutiny requires merely that the relevant statute and regulations "have a rational basis and do not engage in invidious discrimination"³⁷ It is typically concluded that the relevant SSI law does not raise serious issues of fundamental rights or invidious discrimination.³⁸ Thus, equal protection of disabled persons, under the current case law, does not require equality, or much protection, at all.

The idea here may be that because some, though hardly all, disabled persons, including some severely disabled persons, receive SSI benefits not available to non-disabled persons, who do not otherwise qualify, then disabled persons, or perhaps the least severely disabled persons who meet the program's income requirements, have no grounds for a complaint based on equal protection grounds. One might, certainly, have received nothing at all. Something is better than nothing. Perhaps one should merely be grateful. Our view, however, is different. A government does not provide the equal protection of the laws by offering quite limited, inadequate help in rescuing swimmers who are blamelessly drowning, while offering no rescue services to swimmers who are not drowning. This is inequality in terms of basic

³⁶ *Ellis*, 147 F.3d at 144 (citing *Mathews v. De Castro*, 429 U.S. 181, 185 (1976); *Brown v. Bowen*, 905 F.2d 632, 635 (2d Cir. 1990)).

³⁷ *Id.* (quoting *Brown*, 905 F.2d at 635); see also *Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

³⁸ See, e.g., *Ellis*, 147 F.3d at 145.

protection and basic need fulfillment.

Under the standard constitutional framework, persons with disabilities could powerfully challenge the substantive provisions of the SSI and other statutes referred to above only by showing that disability, or some forms and degrees of disability, amount to a suspect classification. The law of suspect classifications is of course traced historically to dicta in the *Carolene Products* case.³⁹ *Carolene Products*, as developed and limited by further case law, raised the possibility of "more exacting scrutiny,"⁴⁰ under the Equal Protection Clause, of "statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ." ⁴¹

This passage has been variously interpreted. On one typical view, "[a] suspect class is a group of individuals whom the Court recognizes as deserving special protection from our majoritarian, political process because the group has a history of having been subjected to purposeful, unjustified discrimination, and a history of political powerlessness."⁴² A bit more elaborately:

[L]egislative enactments were subject to more exacting scrutiny if they discriminated against a readily identifiable group that had suffered a history of invidious discrimination and was powerless, disenfranchised, or substantially disadvantaged in the political arena. Some of the cases also spoke of the immutability of the group's distinguishing trait, the "innocence" of individuals who had not voluntarily selected group membership, and . . . the discreteness and insularity of the group in society.⁴³

It is certainly possible to criticize all or any element of the broad *Carolene Products* approach to suspect status.⁴⁴ Many minorities are not absolutely shut out

³⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

⁴⁰ *Id.*

⁴¹ *Id.* (citations omitted). For discussion of the drafting and presumed intent of this well-known footnote, see Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

⁴² Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938 (1991).

⁴³ James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENTARY 375, 376 (1986). For further discussion, see Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 123–28 (1990). *But cf.* *Milner v. Apfel*, 148 F.3d 812, 815–17 (7th Cir. 1998) (Posner, C.J.).

⁴⁴ See generally Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

of the political process.⁴⁵ Collective action theory suggests that being “discrete and insular” may on balance tend to help, rather than hurt, a group’s bargaining ability.⁴⁶ Deciding whether a group is the victim of mere prejudice, or instead of principled rejection, is often contested.⁴⁷ The theory underlying a given judicial decision on the proper level of scrutiny for a particular classification may bear only a quite modest relation to the actual cultural facts.⁴⁸

Let us in any event summarize some of the considerations commonly associated with suspect classifications: historical intentional discrimination or prejudice, historical political powerlessness, disenfranchisement, disadvantage, immutability of some classificatory trait, innocence or nonvoluntariness of class membership, and discreteness and insularity of the class.⁴⁹ Presumably, current as opposed to merely historical powerlessness or disadvantage could be relevant as well. If we add up these considerations, do we arrive at the conclusion that disabled persons, or at least the most severely disabled persons, fall into suspect classification status?

The conclusion of the Supreme Court is in the negative. The Court’s most extended and explicit discussion of the issue is in the well-known case of *City of Cleburne v. Cleburne Living Center*.⁵⁰ *Cleburne* deals specifically with mentally retarded persons seeking to live in a group home,⁵¹ but the logic of the opinion would seem to extend to other forms of disability. The opinion of the Court can hardly deny the history of discrimination against the disabled.⁵² Instead, the Court emphasizes the common benevolence of the public and of private parties toward the disabled,⁵³ the diversity of the class of disabled persons,⁵⁴ as well as the legitimate,

⁴⁵ See *id.* at 717, 733 n.35, 745 n.57.

⁴⁶ See *id.* at 723–24.

⁴⁷ See *id.* at 737–38; see also Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1091 (1982) (“To infer . . . that the process has been corrupted by invidious discrimination—a judge must have some *substantive* vision of what results the process should have yielded. Otherwise he has no way to know that the process was unfair.”).

⁴⁸ See Ackerman, *supra* note 44, at 745.

⁴⁹ See *supra* notes 41–43 and accompanying text.

⁵⁰ 473 U.S. 432 (1985).

⁵¹ See *id.* at 435. The Court’s opinion actually distinguishes explicitly between the mentally retarded and the disabled, in the course of expressing a reluctance to admit too many groups into suspect classification status. See *id.* at 445–46.

⁵² See *id.* at 455, 461–63 (Marshall, J., concurring in part and dissenting in part).

⁵³ See *id.* at 443–44.

⁵⁴ See *id.* at 442. See also Ellis, *supra* note 43, at 377, 381; SHAPIRO, *supra* note 1, at 5 (“There are hundreds of different disabilities. Some are congenital; most come later in life. Some are progressive, . . . [o]thers are episodic . . .”). As it turns out, “[f]ewer than 15 percent of disabled Americans were born with their disabilities.” *Id.* at 7.

non-invidious reasons underlying a number of classifications on the grounds of disability.⁵⁵ After all, any government program providing some minimal benefits to disabled persons but not to others could well be benevolently and non-invidiously intended.

It is actually not difficult at all to make an argument that some forms of recognized disability fall generally within the scope of suspect classification status, if perhaps only along with other similarly unrecognized groups. Historical attitudes toward persons with disabilities have obviously been mixed. As but a single, far from extreme example, consider an incident reported second hand by Erving Goffman:

I remember . . . a man at an open-air restaurant in Oslo. He was much disabled, and he had left his wheel-chair to ascend a rather steep staircase up to the terrace where the tables were. Because he could not use his legs he had to crawl on his knees, and as he began to ascend the stairs in this unconventional way, the waiters rushed to meet him, not to help, but to tell him that they could not serve a man like him at that restaurant, as people visited it to enjoy themselves and have a good time, not to be depressed by the sight of cripples.⁵⁶

We need not, however, make the argument herein that some or all persons with disabilities should be able to take advantage of suspect classification status. The Court's criteria for suspect status seem unclear in their applicability to disabled persons and of doubtful logical and moral relevance, even if they could straightforwardly guide the Court. There may, in some cases, perhaps even be something loosely paradoxical about a group's winning official and widespread recognition as a suspect class. To be popularly granted suspect classification status by the highest court in the land hardly suggests a broad, consistent, general public hostility toward the affected group, at least unless we assume that the contemporary Supreme Court is significantly more advanced in its moral thinking than the public generally. This does not, however, mean that the courts should apply something like the standard versions of minimum scrutiny in the case of severely disabled persons, as we shall see in Part IV below.

Certainly, persons with disabilities form not merely a large,⁵⁷ but a diverse,

⁵⁵ See *City of Cleburne*, 473 U.S. at 442–45.

⁵⁶ ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 120 (1963) (quoting F. CARLING, *AND YET WE ARE HUMAN* 56 (1962)). More fancifully, see, for example, HUGO, *supra* note 1, at 140–42. Intriguingly, Congress itself refers explicitly in the ADA to persons with disabilities as a “discrete and insular minority” meeting most, if not all, of the tests for suspect classification status. See 42 U.S.C. § 12101(a)(7) (1994). *But see infra* note 62.

⁵⁷ The preamble to the Americans with Disabilities Act refers to 43,000,000 Americans with disabilities as of the date of enactment. See 42 U.S.C. § 12101(a)(1) (1994). Presumably, an aging

heterogeneous group.⁵⁸ Of course, the more broadly the group of persons with disabilities is defined, the less the group members will tend to have in common. The idea of disability can be defined in any number of ways, but some of the major statutes tend to be rather broad and inclusive in scope.⁵⁹ Michael A. Rebell observes that "[w]ithin each disability category is a wide diversity of conditions and needs. These range, for example, from the severely mentally retarded to the mildly learning disabled, from wheelchair-bound paraplegics to clubfoot sufferers with mild mobility impairments."⁶⁰ Disability may be measured not against the general population, but against the higher standards of relatively accomplished groups.⁶¹

Generally, the more diverse the group, the less readily it can aptly be characterized as discrete and insular.⁶² Often, disability theorists and activists tend clearly to want, rightly or not, to undercut the logic of discreteness and insularity of the disabled. Certainly, some forms of disability are intermittent, controllable by medication, or difficult for employers to detect.⁶³ It is argued that disabling

population may enhance this figure, as may, interestingly, the advance of medical science—medicine may both cure or prevent disability, and save the lives of persons who would previously have died, perhaps for disability-related reasons. See SHAPIRO, *supra* note 1, at 5.

⁵⁸ See SHAPIRO, *supra* note 1, at 5.

⁵⁹ See *supra* note 47.

⁶⁰ Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1438 (1986).

⁶¹ See the especially interesting case of *Bartlett v. New York State Bd. of Law Exam'rs*, 970 F. Supp. 1094 (S.D.N.Y. 1997). Bartlett was found to be disabled under the ADA when her reading fluency was compared not to the average member of the general population, but to the average college student or the average law student. See *id.* at 1120–21. Presumably, such a standard assumes that if the person with the disability were not impaired, her relevant ability level would be commensurate with other dimensions of her general measured intelligence, and therefore above the general average, but not higher than a level commensurate with those other dimensions of her intelligence. For further discussion, see Robert F. Ladenson, *What Is a Disability?*, 11 INT'L. J. APPLIED PHIL. 1, 2–3 (1996).

⁶² But see the prefatory findings to the ADA, 42 U.S.C. § 12101(a)(7) (1994). See also *Kimel v. State of Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998); W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls' Concept of Social Justice*, 22 N.M. L. REV. 295, 314 (1992). Of course, if Congress had been serious about the suspect classification status of persons with disabilities, it is hardly clear why it would have allowed a broad cost-benefit defense to claims of intentional discrimination. See *supra* notes 12, 13, 22 and accompanying text. By contrast, intentional discrimination on the grounds of race can hardly be justified by reference to modest cost-benefit calculations. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (holding that all racial classifications, imposed by federal, state, or local government actor, must be analyzed under strict scrutiny). It is difficult to explain this marked difference in the constitutional tests applied if race and disability both evoke strict scrutiny as suspect classifications.

⁶³ Note, for example, the possibility of medically controlled diabetes as a disability under the

conditions occur randomly, potentially affecting anyone, at any point in the life cycle,⁶⁴ and thus we must all contemplate our being personally drawn within the classification.⁶⁵ Thus "disabled people are not 'other,' . . . they are really 'us.' Unless we die suddenly, we are all disabled eventually."⁶⁶ In some sense, a sharp, binary disabled/nondisabled distinction is obviously questionable,⁶⁷ and there are undeniable and important variations in the lives and circumstances of even the most severely disabled persons.

The public attitudes of currently non-disabled persons also seem largely incongruent with the logic of discrete and insular status. One poll indicated that almost half the public, sensing their personal vulnerability, feared becoming disabled themselves.⁶⁸ Of course, fear of personal disability hardly implies that one must feel benevolent toward those who are currently disabled. But the disabled are a class to which we may all eventually belong. Admittedly, "sixteen percent were angered because 'disabled people are an inconvenience,' and nine percent said they felt resentment at 'the special privileges disabled people receive.'"⁶⁹ But the broader

ADA. See, e.g., *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 863 (1st Cir. 1998) (holding that the evaluation of a disability is to be made "without considering the ameliorative effects of [the plaintiff's] insulin medication"). But cf. *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1444 (W.D. Wis. 1996) (rejecting the EEOC interpretation at 20 C.F.R. pt. 1630 App. § 1630.2(j)); *Coghlan v. H.J. Heinz, Co.*, 851 F. Supp. 808, 811–12 (N.D. Tex. 1994) (same). For a discussion of medically controlled epilepsy, see, for example, *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937–38 (3d Cir. 1997) (holding that "disabled individuals who control their disability with medication may still invoke the protections of the ADA"). The Supreme Court has held that "asymptomatic" HIV infection is a disability under the ADA. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2204 (1998).

⁶⁴ See Rebell, *supra* note 60, at 1440 (stating that "because disabling conditions occur randomly, each individual is personally susceptible of at some time becoming a member of the handicapped minority on a temporary or permanent basis through disease, accident, or age").

⁶⁵ See *id.*

⁶⁶ Susan Wendell, *Toward a Feminist Theory of Disability*, HYPATIA, Summer 1989, at 104, 108.

⁶⁷ See Robert L. Burgdorf, Jr., "Substantially Limited" Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 519 (1997).

⁶⁸ See Stein, *supra* note 6, at 261–62.

⁶⁹ *Id.* at 262. Some fraction of these figures may reflect the inconvenience of non-disabled persons not being able to themselves utilize the mirage-like, highly desirable and tauntingly available handicapped parking spaces. In whatever spirit, handicapped parking spaces are not invariably held sacrosanct. See, e.g., Sylvia Moreno, *New Parking Fee Irks Disabled Drivers; Arlington Charges for Handicapped Spaces, Hoping to Curb Abuses by Able-Bodied*, WASH. POST, June 2, 1998, at B1. One might imagine that these response figures understate the true percentages, given the presumed social undesirability of this sort of whining. But on the other hand, this argument would itself assume a public norm against expressing this sort of hostility

public sentiment more typically partakes of something like pity,⁷⁰ if not more affirmatively progressive attitudes.⁷¹ Surely the most severely disabled persons generally evoke at least as much pity as those less severely disabled.

The courts and commentators accordingly tend to conclude that the major difficulties faced by persons with disabilities stem not from public hostility or prejudice, but at worst from thoughtlessness, indifference, or neglect.⁷² These are not the sorts of attitudes that are typically thought to call for the imposition of suspect class status. Given our universal vulnerability to disability in the future, the large number of currently disabled persons and disabled voters,⁷³ and the general lack of hostility toward the disabled,⁷⁴ the courts and commentators tend to trust the ordinary legislative processes to adequately protect the interests of the disabled. The Supreme Court in *Cleburne* quoted John Hart Ely to the following effect: "Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling."⁷⁵ The Court thus rejected the claim "that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers."⁷⁶

The official view is thus that the disabled, or at least those who cannot be blamed for their disability, evoke widespread sympathy, or at least pity. As legislators presumably share in this sentiment, suspect classification status is not appropriate for persons with disabilities. Again, we do not suggest in the slightest that pity is actually the appropriate general attitude toward disabled persons, merely that it is not typically considered grounds for invoking suspect classification status. What we have called limited benevolence thus undermines any stringency with which measures aimed at the disabled might otherwise be judicially reviewed.

toward the disabled.

⁷⁰ See Stein, *supra* note 6, at 252.

⁷¹ Cf. SHAPIRO, *supra* note 1, at 332 (stating that "people with disabilities want neither pity-ridden paternalism nor overblown admiration").

⁷² See, e.g., *Alexander v. Choate*, 469 U.S. 287, 295-96 (1985) (characterizing the public state of mind, as of 1973, as one more of thoughtlessness and indifference than overt animus); *Wendell*, *supra* note 66, at 110 (stating that "many of the 'special' resources the disabled need merely compensate for bad social planning that is based on the illusion that everyone is young, strong, healthy (and often male)").

⁷³ See *supra* notes 57, 64-66 and accompanying text. See also Stein, *supra* note 6, at 258 (stating that "nearly one in seven Americans has some form of disability").

⁷⁴ See *supra* note 69 and accompanying text.

⁷⁵ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 n.10 (1985) (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 150 (1980)).

⁷⁶ *Id.* at 445. But see Ladenson, *supra* note 61, at 7 (acknowledging that persons with disabilities are ignored and facing "possibly overwhelming obstacles" to political defense of their interests).

Generally, disability of whatever degree does not fit the standard logic of strict judicial scrutiny through suspect classification.

What this shows is, however, subject to reasonable dispute. We might simply infer that persons with disabilities generally receive their constitutional due, and that there is nothing constitutionally defective overall with the various federal statutes and programs addressing the disabled. This, however, is not the only possible inference. We might instead infer that the familiar logic of suspect classification status does not responsively address the circumstances of the most severely disabled. Being able to draw the attention of legislators, or to evoke pity, is hardly the same as evoking a sense of the fundamental equality of even the most severely disabled persons. Nor is subjectively respecting the most severely disabled persons a guarantee that their equal protection rights are being fully respected. The standard suspect classification inquiry would thus be inadequate with respect to the most severely disabled. Instead, a different, deeper, and truer logic of equal protection would be required.

IV. DISABILITIES AND THE UNDERLYING LOGIC OF EQUAL PROTECTION

The most basic elements of such a deeper logic of equal protection are not difficult to construct. The ideas of justice and morality themselves require the equal and universal consideration of interests.⁷⁷ This, however, is not just a mechanical process, as we must be able to empathize broadly, and to place ourselves insightfully in the position of others who may be unlike ourselves.⁷⁸ This basic requirement applies, certainly, in the case of persons with severe disabilities.⁷⁹ Disabilities in general are thought of by most persons as relevant in assessing a person's position for basic moral purposes.

Our basic thesis is simply that genuine equality of constitutional treatment, or equal protection, requires the law to recognize the significance of severe disabilities. Merely offering some minimal benefit to some, or even all, such persons not received by many, or even all, non-disabled persons does not afford equal protection of the law. If one person is drowning and another person is safely relaxing on dry land, genuine equal protection requires more than minimal efforts to rescue the drowning person, even if we do absolutely nothing for the non-drowning person.

We have in such a case admittedly done more, in a sense, for the drowning person than for the non-drowning person, and in this formal sense given the drowning person more than equal protection. But in a more serious sense, we have denied equal protection—literally, much of any protection—to the drowning person. We have fulfilled only some, and not all, of the drowning person's basic needs for

⁷⁷ Cf. RICHARD M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* 21 (1981).

⁷⁸ Cf. *id.* at 22.

⁷⁹ See SINGER, *supra* note 5, at 52.

protection against drowning. And in doing nothing, we have in contrast fulfilled all of the non-drowning person's needs for protection from drowning. In terms of fulfillment of this crucial need, the drowning person has received far less than has the non-drowning person. She has thus been denied equal protection.

One writer has rightly observed that "[e]very person recognizes that she would be less well off if she suddenly became disabled, even if her bundle of social goods remained the same. Why would she not want society also to recognize her disadvantage?"⁸⁰ Surely the relevant considerations may include not only resources such as the financial assets we earn or inherit, but our basic physical health and strength as well.⁸¹ If we are to treat like cases alike, and unlike cases unlike, we must take severe disability and its absence into consideration. We do not accord equal protection to person A by only minimally accommodating A's blamelessly incurred basic need, while doing nothing for B who simply has no such corresponding need. Although we have in some formal sense given more to A than to B, we have thereby left A's but not B's blameless basic needs unfulfilled.

When we assess someone's overall advantages and disadvantages, we naturally include consideration of physical and mental disabilities because these conditions often affect a person's basic capacity to function in ways that persons in general, or even that particular person, have reason to value.⁸² Disabled persons may thus be at a crucial special disadvantage, in that even an income equal to that of a non-disabled person may leave the disabled person worse off by comparison.⁸³ This is

⁸⁰ WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 71 (1990).

⁸¹ See RONALD DWORKIN, *Foundations of Liberal Equality*, in *EQUAL FREEDOM: SELECTED TANNER ESSAYS IN HUMAN VALUES* 190, 224 (Stephen Darwall ed. 1995). Dworkin observes that:

The resources people control are of two kinds: personal and impersonal. Personal resources are qualities of body and mind that affect people's success in achieving their plans and projects: physical and mental health, strength, and talent. Impersonal resources are parts of the environment that can be owned and transferred: land, raw materials, houses, television sets and computers, and various legal rights and interests in these.

Id.

We may recall that Aristotle notes that Milo the wrestler requires a more robust diet than his more sedentary peers. See ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEON ETHICS TRANSLATED* 65 (J.A.K. Thomson trans. 1953). Unless we want to challenge the legitimacy of being a wrestler as a baseline, we should recognize that we are not really treating Milo equally if we allow him little to eat, and expect him to wrestle, even if we allow his sedentary peers even less.

⁸² See AMARTYA SEN, *INEQUALITY REEXAMINED* 4-5 (1995).

⁸³ See, e.g., DOUGLAS RAE, *EQUALITIES* 91, 99 (1981) (citing ALBERT WEALE, *EQUALITY AND SOCIAL POLICY* 47 (1978)); Sen states that "equal incomes can still leave much inequality in our ability to do what we would value doing. A disabled person cannot function in the way an able-bodied person can, even if both have exactly the same income." SEN, *supra* note 82, at 20; see also Richard J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for*

not a matter of unequal medical expenses; many persons with substantial disabilities have only average or below average medical expenses.⁸⁴ And for the sake of simplicity, we may ignore the fact that in our society, a government check does not bring anything near the social and psychological rewards that may flow from an earned income check of the same amount.

The special overall disadvantage to which disabled persons may be subject may be thought of, however inaccurately, as natural, or more realistically as socially constructed, or as a combination of both.⁸⁵ This overall disadvantage may in any event be thought of as a matter of natural or social injustice⁸⁶ or unfairness.⁸⁷ While it is possible to object to the language of injustice or unfairness, especially if we dubiously assume that disabilities are never socially constructed even in part,⁸⁸ a case for substantial, if not complete⁸⁹ equalization, can be made. Certainly, at the very least, our public and legal reactions to disability are either just or unjust, and not simply natural and inevitable.

Even if we believe that the language of injustice or unfairness, at least in a narrow sense, is not strictly applicable to a purely physiological condition, we must still consider issues of luck, responsibility, desert, and voluntariness in connection with disabilities. Persons differ widely in their physiological condition and

Welfare, 19 PHIL. & PUB. AFF. 158, 187 (1990) (making a similar argument).

⁸⁴ See, e.g., Sara D. Watson, *The Evolution of a Social Movement*, 3 CORNELL J.L. & PUB. POL'Y 254, 257-58 (1994).

⁸⁵ See, e.g., Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 770 (1992) (stating that "[l]ike the notion of the poor, the concept of the disabled is an artifact of American law and society"); CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* 113 (1988) (describing medical models as distracting from social causation of the real effects of disability); Wendell, *supra* note 66, at 105 (stating that "disability is largely socially constructed"). Of course, the social construction of disability does not mean that the obvious effects of disability and its treatment are less real to persons with disabilities, or that medical treatment or prevention is inevitably inconsequential. Instead, the social constructedness of even severe disabilities should further heighten the sense that disability, and our public treatment thereof, is a matter of justice and equality, or their opposite.

⁸⁶ See, e.g., LARRY S. TEMKIN, *INEQUALITY* 13 (1993) (maintaining that "it is a natural injustice that some are born blind whereas others are not, though it may be more appropriate to say it is a natural unfairness rather than a natural injustice").

⁸⁷ See *id.*

⁸⁸ See, e.g., Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 134 (1998) (pointing out that dyslexia would not be a disability in a non-literate culture); see also sources cited *supra* note 85.

⁸⁹ See SEN, *supra* note 82, at 91 (recognizing that no feasible redressive policy may completely equalize the functioning capacities of some persons with disabilities); see also RAE, *supra* note 83, at 99 (making similar argument).

circumstances, even from birth,⁹⁰ in ways that crucially affect their prospects.⁹¹ If the law is to treat people unequally, or even ratify what may appear to some to be natural inequalities, it must do so only on legitimate, morally relevant grounds.⁹² This certainly does not mean that all inequalities should be minimized.⁹³ Rather, what should be constitutionally unacceptable are stark, dramatic, elemental disadvantages for which the persons adversely affected cannot be held responsible.⁹⁴

Some severe disabilities, certainly, cannot at all be ascribed to any choice, fault, or other responsibility of the person directly affected.⁹⁵ Some disabilities, for example, are congenital.⁹⁶ Others, certainly, involve not the slightest negligence, risk-acceptance, or even any choice at all on the part of those affected. As one disability theorist observes, "'success' at being healthy, like beauty, is always partly a matter of luck and therefore beyond our control."⁹⁷ At the very least, some instances of disability stem from "brute bad luck" not reflecting any choice or risk voluntarily undertaken.⁹⁸ In some rare cases, the bad luck of severe disability may

⁹⁰ See, e.g., Jeff McMahon, *Cognitive Disability, Misfortune, and Justice*, 25 PHIL. & PUB. AFF. 3, 3 (1996).

⁹¹ See *id.*

⁹² See WILLIAM A. GALSTON, *LIBERAL PURPOSES* 198 (1991) (stating that "philosophically, the distinction between nature and society (or, for that matter, between what we have earned and what befalls us) must be reinterpreted as the distinction between relevant and irrelevant reasons for treating individuals in certain ways").

⁹³ See THOMAS NAGEL, *EQUALITY AND PARTIALITY* 71 (1991).

⁹⁴ See *id.* ("What seems bad is not that people should be unequal in advantages or disadvantages generally, but that they should be unequal in the advantages or disadvantages for which they are not responsible. Only then must priority be given to the interests of the worse off."). Our concern, it might be emphasized, is not with inequalities in general, but only with the circumstances faced by persons falling below some baseline referred to as a disability.

⁹⁵ For the linkages among fault, choice, and responsibility, see TEMKIN, *supra* note 86, at 13 n.21. See also Jonathan Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97, 99–100 (1998).

⁹⁶ See, e.g., Gregory S. Kavka, *Disability and the Right to Work*, 9 SOC. PHIL. & POL'Y 262, 276–77 (1992); SHAPIRO, *supra* note 1, at 7 (stating that "[f]ewer than 15 percent of disabled Americans were born with their disabilities").

⁹⁷ Wendell, *supra* note 66, at 114. Of course, sometimes good or bad luck follows upon some risk or gamble we have undertaken in hopes of a payoff. Thus, someone who is disabled as a result of an accident in some obviously dangerous, voluntarily undertaken recreational or tortious activity may well not be able to evade responsibility for some, if not all, of the consequences of a free and knowledgeable choice. For discussion, see Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 293 (1981) (distinguishing between "brute luck" and "option luck"); Arneson, *supra* note 83, at 187 (referring to voluntary participation in dangerous sports).

⁹⁸ See Dworkin, *supra* note 97, at 296; G.A. Cohen, *On the Currency of Egalitarian Justice*,

be partly compensated for by, for example, the good luck of being born into an exceptionally wealthy family, but we should not imagine this to be a typical pattern.

The themes of alleged free choice and responsibility are, however, typically relied upon to undercut rather than to support proposals for the redistribution of resources.⁹⁹ We see redistribution from the improvident grasshopper to the industrious ant as both objectionable and shortsighted. We hold the grasshopper responsible for its risky or foolish choices. But where responsibility and choice played no role in someone's severely adverse circumstances, we should collectively admit that this change matters. As Gregory Kavka wrote, "the handicapped typically are, in virtue of their condition, among the most disadvantaged members of advanced modern societies¹⁰⁰ with respect to well-being and opportunities for well-being."¹⁰¹ Nor should we realistically fear that increased benefits to the most severely disabled persons will set up strong incentives for people to severely disable themselves, or to voluntarily turn moderate disability into severe disability, even if we were to utterly ignore voluntariness in compensating for disability.

It is certainly possible to object to this approach, and not only from the self-interested standpoint of one who is not now disabled. Some persons with disabilities object as well. It has been urged, for example, that referring to characteristics for which disabled persons should not be held responsible, or which are beyond their control, stigmatizes persons with disabilities as inferior.¹⁰² Surely the last thing

99 ETHICS 906, 908 (1989) (discussing the egalitarian impulse to counteract both exploitation and "brute luck"); *see also id.* at 916 (arguing for the elimination of involuntary disadvantage, in the sense of "disadvantage for which the sufferer cannot be held responsible, since it does not appropriately reflect choices that he has made or is making or would make"); Kavka, *supra* note 96, at 280, 282–83. This is of course not to suggest that persons who become disabled through voluntary risk taking or even intentional behavior should be consigned to private charity. *See id.* at 282–83. Federal benefit programs such as the Rehabilitation Act of 1973 often do not inquire into the (initial) voluntariness of the claimant's disability. *See, e.g., Andrews v. State*, 104 F.3d 803, 809 (6th Cir. 1997); *Cook v. State*, 10 F.3d 17, 24 (1st Cir. 1993). *But cf. Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (Cal. 1984) (taking the voluntariness and self-imposition of a body-builder's physiology into consideration).

⁹⁹ *See, e.g.,* CHARLES A. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950–1980*, at 212–16 (1984).

¹⁰⁰ The constitutional arguments herein for redistribution of resources in favor of at least some disabled persons are intended to apply to our own society, which is bound by an equal protection clause and is assumed to possess enormous technological (specifically, medical technology) potential, and more broadly, to generate an enormous economic surplus, much of which is devoted to consumption that is not even seriously argued to be fulfilling of human potential. *See generally* R. GEORGE WRIGHT, *SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE 195–96* (1997).

¹⁰¹ Kavka, *supra* note 96, at 270.

¹⁰² *See* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341,

disabled persons need is a theory, even if well-intended, that presumes their inferiority.

There is, however, no necessary connection between having characteristics that are beyond our control and any suggestion of inferiority of disabled persons. Disabled persons are not inferior, or somehow less persons. All persons have some characteristics that are beyond their control, and we are not thereby inferior. Merely being beyond our control does not make a trait a mark of inferiority. In a sense, that which was and is beyond our control cannot mark our genuine inferiority, or our superiority for that matter. Of course, we would not think of a condition as disabling if we did not evaluate it negatively, but it is the crudest moral error to associate disability with a person's inferiority in any significant sense. Persons with disabilities deserve the genuinely equal protection of the laws precisely because they are genuinely equal as persons. Their basic needs and basic circumstances should be legally recognized and accommodated as sensitively as those of anyone else.

A loosely parallel analysis could be made in the context of the historical movement for the equal protection of minorities and women. To argue for equal protection for such groups is clearly not to suggest their inferiority in any relevant sense. Rather, it is to point out that their genuine equality as persons is not being, but should be, legally recognized.

It is worth emphasizing that equal protection is a matter of rights, but that rights of this sort can be voluntarily waived by competent persons. Anyone with a severe disability who wishes either to reject that label as inappropriate, or who does not for any reason wish to accept any additional government benefits, should of course be respected and accommodated. This would be merely another way in which to treat such persons equally.

Without a doubt, it is wrong to associate disability with passivity, general powerlessness, or an inability to take initiative or to change the course of one's life.¹⁰³ It is also important, however, to avoid the opposite error of suggesting that the most heroically triumphant disabled persons should be seen as setting the standard of legal expectations for all disabled persons.¹⁰⁴ It is really no compliment to disabled or any other persons to hold them to unrealistic standards, or in general to pretend that they are other than they are. Doing so is itself undignified, deflects attention from the need for remedial collective action¹⁰⁵ and helps rationalize

1399 (1993).

¹⁰³ Gregory Kavka observed that "[i]n pointing out the pervasiveness of the difficulties disabled persons face, I do not mean to suggest that the individuals in question are powerless to overcome or ameliorate these difficulties." Kavka, *supra* note 96, at 271.

¹⁰⁴ See Wendell, *supra* note 66, at 116 (stating that "[w]hile disabled heroes can be inspiring and heartening to the disabled, they may give the able-bodied the false impression that anyone can 'overcome' a disability").

¹⁰⁵ Cf. Wasserman, *supra* note 22, at 7, 8.

indifference or only limited benevolence toward persons with disabilities. Assigning responsibility where it does not belong is most typically a matter of expressing public indifference toward or devaluing and denying justice to those affected.¹⁰⁶ Imposing responsibility on those individuals who do not properly bear it thus allows a society to evade its own remedial responsibility¹⁰⁷ and may even help account for the remarkably low disability program benefit levels discussed above.¹⁰⁸

More substantial transfers of resources to the most severely and faultlessly disabled would thus help redress, however incompletely, the arbitrary burden of those disabilities. But there is more to be said in favor of such transfers of resources than this redress of elemental undeserved burdens. Such transfers of resources also contribute, on balance, to the important social values of dignity and elemental physical independence, community-building forms of equality, overall social freedom, relief of elemental suffering and deprivation, and the development of basic human potential.

Admittedly, any transfer of resources to the severely genetically unlucky from the genetically lucky that is not consented to by the latter will reduce, to some degree, the latter's freedom.¹⁰⁹ A tax on business incomes to pay for widely used curb cuts or accessible buses admittedly reduces at least minimally not only the income, but quite possibly the effective range of choices available to the non-disabled. This amounts to a reduction in the latter's effective freedom.¹¹⁰ Any compulsory transfer of resources would have a similar general effect. But it can then hardly be denied that such transfers also have corresponding and often much more dramatic effects on the freedom of disabled persons.¹¹¹ The feasibility of going shopping or to a public event, for example, is not just a new ability, but a new socially generated alternative choice. The range of alternative actions and choices and therefore the social freedom realistically available to the disabled person has been valuably extended.

¹⁰⁶ See LIACHOWITZ, *supra* note 85, at 9 (stating that "[a] substantial part of the devaluation, and therefore the [socially constructed] disablement of handicapped people can be traced to the American conceptions of individualism and responsibility").

¹⁰⁷ In a different context, see R. GEORGE WRIGHT, *DOES THE LAW MORALLY BIND THE POOR?*, at ch. 2 (1996).

¹⁰⁸ See *supra* notes 31–35 and accompanying text.

¹⁰⁹ See Mark A. Schuman, *The Wheelchair Ramp to Serfdom: The Americans with Disabilities Act, Liberty, and Markets*, 10 ST. JOHN'S J. LEGAL CMT. 495, 496, 508 (1996); see also Sue A. Krennek, Note, *Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969, 1993 (1994) (discussing Richard Epstein on anti-discrimination law and freedom of contract).

¹¹⁰ See, e.g., Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312, 320–21 (1967); Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122–23 (1969).

¹¹¹ See Phillip Cole, *Social Liberty and the Physically Disabled*, 4 J. APPLIED PHIL. 29, 29 (1987).

Any reasonably empathetic or impartial judgment will suggest that transfers of resources may increase the value and range of effective choice open to disabled persons far more than they contract that of the non-disabled. No one argues that the limbs and organs of the non-disabled should be coercively removed and parceled out among the severely disabled. Less intrusive and less freedom-destructive ways of assuring equal protection are available. This also is not a matter of forcing non-disabled persons to be more subjectively thoughtful toward disabled persons, or any coerced change in attitudes. Non-disabled persons should remain free to think what they like as far as the Constitution is concerned.

Indeed, the Americans with Disabilities Act is itself commonly defended in terms of freedom¹¹² and expanded choice,¹¹³ as well as other values including equality and participation.¹¹⁴ Although the ADA can indeed be promoted in terms of individual freedom, the ADA is hardly the last word in freedom, or other values, for persons with disabilities. More substantial transfers of resources, including more substantial SSI-like programs, might well contribute further to the freedom and developmental opportunities of the disabled.¹¹⁵ Nor could it be said that further transfers in favor of the disabled must undercut the freedom of the non-disabled to any counterbalancing degree. Instead, the main effect would presumably be to merely reduce the inequality in effective ranges of valuable choice open to disabled and non-disabled persons.

The basic point has been aptly expressed by philosopher Philip Kitcher, who observes that:

Respect for individual liberty is a worthy ideal, but that ideal cannot properly be expressed in a "hands off" attitude toward redistribution of assets [R]edistribution might decrease the autonomy of the privileged by only a slight amount while greatly enhancing the autonomy of the helplessly disadvantaged [T]he directive not to demand assets from the well-to-do would be more accurately advertised as a maxim to respect the liberty of the winners in the lotteries that fix initial circumstances.¹¹⁶

¹¹² See, e.g., Stein, *supra* note 6, at 246 (quoting President George Bush referring to the ADA as heralding "a bright new era of equality, independence, and freedom").

¹¹³ See, e.g., Blanck, *supra* note 24, at 883 (stating that "[t]he ADA reflects a policy of equal opportunity, full participation, and choice in life").

¹¹⁴ See *supra* notes 112–13.

¹¹⁵ Cf. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 455, 466 (1985) (Marshall, J., concurring in part and dissenting in part) (stating "what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom").

¹¹⁶ PHILIP KITCHER, *THE LIVES TO COME: THE GENETIC REVOLUTION AND HUMAN POSSIBILITIES* 313–14 (1996).

The basic values by which we assess justice and fairness as components of equal protection thus point toward more substantial transfers of resources in favor generally of severely disabled persons.

This is not to suggest that our leading theorists have unequivocally endorsed such resource transfers. Even the work of John Rawls, for example, leaves loose ends in this regard. Rawls's theory is sufficiently rich, multi-leveled, and detailed that the interests of disabled persons are affected at a number of points. Thus there is no simple, easily statable Rawlsian approach to disability. Rawls's basic view is that the distribution of purely natural assets is not itself a matter of justice.¹¹⁷ On the other hand, "undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for . . . [I]n order to treat all persons equally, society must give more attention to those with fewer native assets."¹¹⁸ Rawls's principles do, at one level, provide for certain inequalities in the provision of basic social goods,¹¹⁹ and he typically seems to see inequalities as mainly a matter of economic wealth and poverty, without giving independent consideration to even severe disabilities.¹²⁰ Some severely cognitively disabled persons probably do not count as Rawlsian moral persons for purposes of bargaining over or selecting principles of justice.¹²¹ But the inequalities Rawls permits must be compatible with basic Rawlsian principles of equal liberties and fair equality of opportunity.¹²² An authentically Rawlsian approach could therefore ask whether severely disabled persons are accorded equal liberties and fair equality of opportunity at the constitutional level.

Thus if Rawls believes that two persons are equally well off whenever they have equal incomes, even though one may be severely disabled and may even

¹¹⁷ Clearly, there are many disabilities that may afflict someone from birth that may be traceable, at least in part, to family poverty. Thus, some inequalities of natural assets may reflect injustice in the distribution of goods and opportunities.

¹¹⁸ JOHN RAWLS, A THEORY OF JUSTICE 100-01 (1971).

¹¹⁹ See *id.* at 76-80; see also Alexander J. Bolla, Jr., *Distributive Justice and the Physically Disabled: Myth and Reality*, 48 MO. L. REV. 983, 984 (1983).

¹²⁰ See SEN, *supra* note 82, at 92; see also CHARLES FRIED, RIGHT AND WRONG 126-27 (1978) (endorsing Rawls's focus on the worst-off productive workers, as opposed to severely disabled persons with or without market-based incomes, but also at least raising the issue of the fairness of equating the incomes of persons with and without expensive medical needs); KYMLICKA, *supra* note 80, at 70-71; Gray, *supra* note 62, at 312. If we define 'disability' as broadly as most statutes do, the range of severity of disabilities becomes so correspondingly broad, from mild to severe, that it is difficult to see the disabled in general as a homogeneous group, let alone as the worst off representative group for purposes of reflection on principles of justice.

¹²¹ See RAWLS, *supra* note 118, at 505; see also Gray, *supra* note 62, at 333; McMahon, *supra* note 90, at 5.

¹²² See RAWLS, *supra* note 118, at 302-03.

require expensive treatment or other services, his view would be unrealistic.¹²³ But although Rawls does not view the disabled, in general, as the least well off group,¹²⁴ and does not focus specifically on persons' physical capabilities or limitations,¹²⁵ he clearly includes rights, opportunities, and powers to be within the scope of his important measuring rod of "primary social goods."¹²⁶ Thus, for Rawls, a disabled person can be importantly worse off, if, because of our reactions to her disabilities she has few realistic social or civic opportunities, even if her monetary income is equal to that of a non-disabled person.

Rawls also develops what he refers to as the Aristotelian Principle,¹²⁷ which can certainly be turned to the advantage of persons with disabilities. The Aristotelian Principle holds that all else equal, persons enjoy the development and exercise of their latent capacities, and in complex rather than limited or repetitious ways.¹²⁸ This principle accounts for the relative prominence among adults of bridge, as opposed to tic-tac-toe, clubs. It also helps explain why many persons with disabilities object to socially constructed barriers to the fuller exercise of their latent capacities, even if reducing those barriers would be socially expensive. The transfer of resources to many severely disabled persons can easily be said to advance the development of their potential more meaningfully than the loss of such resources could be said to inhibit such development on the part of non-disabled persons. Surely, most middle class persons spend significantly on commercial goods and services that they cannot pretend to argue advance the development of their higher capacities.

The deepest Rawlsian contribution to the case for more significant resource transfers in favor of severely disabled persons, though, is more indirect. The idea of a Rawlsian "veil of ignorance"¹²⁹ as a device to screen out morally arbitrary biases in choosing principles of justice is by now familiar.¹³⁰ We can, and should, apply the logic of a veil of ignorance to the context of disability. Behind this veil, we are asked to choose principles of distributive justice without knowing whether we are able-bodied or afflicted with some severe congenital disability. To choose a rule of justice regarding disabled persons on the selfish basis that we ourselves are not disabled—or in fact are indeed disabled—really tells us very little about justice as opposed to self-interest based on our own morally arbitrary initial lot in life. Behind

¹²³ See KYMLICKA, *supra* note 80, at 70–72.

¹²⁴ See *supra* note 120; see also Dworkin, *supra* note 97, at 339.

¹²⁵ See SEN, *supra* note 82, at 92.

¹²⁶ RAWLS, *supra* note 118, at 62.

¹²⁷ See *id.* at 424–33; see also Gray, *supra* note 62, at 334.

¹²⁸ See RAWLS, *supra* note 118, at 426; see also Gray, *supra* note 62, at 334.

¹²⁹ RAWLS, *supra* note 118, at 136–42.

¹³⁰ See *id.*

the veil of ignorance, we are logically led in the direction of taking everyone's interests seriously, and of choosing principles of justice on morally relevant grounds. Under such circumstances, we are less inclined to slight the severely disabled, as we might well, for all we know, be thereby slighting ourselves.

It is all very well to argue that disabled persons are not "other," or that we must appreciate that most of us will eventually become disabled, in some way, if we are lucky.¹³¹ The direct, personal interests of non-disabled adults and of those persons significantly disabled from birth nonetheless still undeniably conflict. Able-bodied adults know they face some future likelihood of some form of disability. Even this realization may be discounted, as merely a distant possibility set in an unreal future. The able-bodied also know, in the absence of a veil of ignorance, that they were not born with and did not early develop a disability, and cannot possibly gain directly from any transfer to such persons. There are no insurance pools for publicly known, fully established present circumstances.

If justice were thus a matter of the results of self-interested bargaining between the severely disabled and the non-disabled, the disabled would hardly stand a chance.¹³² As long as all participants know their statuses, the disabled have little to bargain or negotiate. What can the severely disabled offer? What can they threaten? Where are the resources with which the severely disabled might exert any sort of leverage to counterbalance that of the able-bodied? Why can't the non-disabled simply wait them out?¹³³

Under such bargaining conditions, "equal" protection is reduced to the government's offering only minimal rescue services to the blamelessly drowning, while not making any special effort at all to rescue the non-drowning. This, again, offers only formal as opposed to substantive or responsive equal protection. If justice were a matter of leverage, the severely disabled would be out of luck. Justice, however, is distinct from, if not rather the opposite of, the exertion of arbitrarily acquired leverage. The exploitation of a monopoly one happened to merely luck into, genetically or otherwise, is not the expression of a principle of equality in any serious sense. An understanding of bargaining that allows the undeservedly well off

¹³¹ See, for example, Wendell, *supra* note 66, at 108, which states that "disabled people are not 'other,' they are really 'us.' Unless we die suddenly, we are all disabled eventually."

¹³² Thomas Hobbes famously assumes rough equality in the sense that the weakest, at least in combination, are able to kill the strongest, but it is not clear that his model can be stretched to encompass all of the severely disabled. See generally THOMAS HOBBS, *LEVIATHAN*, at ch. 13 (Prometheus Books ed., 1988). For an updated revision, see generally DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986). For general background, see generally JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986); GREGORY S. KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* (1986).

¹³³ Contrast the emphasis, in much feminist thought, on interdependence as opposed to justice construed as a resultant of the pursuit of individual self-interest. See Watson, *supra* note 84, at 261-62.

to ignore or even to starve the undeservedly weak into submission is a question-begging, if not utterly perverse, understanding of justice and equality.

There is not much good faith interest in an idea of justice or equal protection that serves merely to validate the exercise of pre-existing, pre-moral advantages in the distribution of resources and abilities. We see the expression of self-interested power and legitimizing charity in current patterns of public spending on disabilities and general health care. This gulf between power and justice is especially clear when we focus on matters of age. Again, non-disabled adults hardly need fear disability retroactively. They thus gain little direct benefit by helping those with congenital disabilities. Collectively, we can choose between spending heavily on, say, preventing childhood disabilities, or spending heavily on medical care for those at the end of a long and medically largely unimpaired life. Current health care spending patterns reflect the political influence of the morally arbitrary advantage of age.¹³⁴

It is not surprising that "[r]esearch, funding, and medical care are more directed toward life-threatening conditions than toward chronic illnesses and disabilities."¹³⁵ At some level, it is hardly objectionable to prioritize death over disability. What is objectionable, however, is publicly prioritizing the desperate extending of the last few months of a previously unimpaired life over the research and development needed to reduce the frequency or severity of the most serious congenital disabilities.¹³⁶ Devoting scarce public resources to the brief prolongation of a full and generally unimpaired life at the expense of those who might otherwise have avoided a life of serious disability is unjust,¹³⁷ however faithfully such a public priority may reflect self-interested voting strengths.¹³⁸

¹³⁴ This is again not to suggest that persons with severe disabilities also have above average health care costs; some such disabilities have no medical complications and no associated expensive medical treatment.

¹³⁵ Wendell, *supra* note 66, at 114.

¹³⁶ See KITCHER, *supra* note 116, at 305 ("The great preponderance of the money spent on health care in the United States is used to prolong lives for very short periods (under about eighteen months), and a large proportion of this is spent during the last month of life."). For some remarkable survey figures on spending priorities, see Marion Danis & Larry R. Churchill, *Autonomy and the Common Weal*, 21 HASTINGS CTR. REP., Jan.-Feb. 1991, at 25-26. For general background, see, for example, M. Cathleen Kaveny, *Managed Care, Assisted Suicide, and Vulnerable Populations*, 73 NOTRE DAME L. REV. 1275 (1998).

¹³⁷ Cf. KITCHER, *supra* note 116, at 306 ("Medicine should be reoriented toward expanding the potential of the young.").

¹³⁸ One might argue that some of the end-of-a-full-life medical spending also prevents or at least delays serious disability, as well as death. Certainly, this effect, in isolation, is a victory on the broad disability front. But it can hardly be considered central by those generally concerned with the status of disabled persons. For obvious reasons, a disability that accrues only in relatively old age cannot be given moral weight comparable to that of a congenital disability. Persons who

V. CONCLUSION

Self-interest leads the political and legal system to what we have referred to as only limited benevolence¹³⁹ toward even the most severely and blamelessly disabled. This has been rationalized through the American ethos of individualism,¹⁴⁰ which leaves economic burdens primarily on the affected person, the immediate family,¹⁴¹ and on private charity,¹⁴² with resulting inequalities then being only minimally adjusted¹⁴³ or thought of as inevitable.¹⁴⁴ Genuine equal protection, on the other hand, requires that public policy take obvious basic differences in undeserved circumstances and needs into full consideration. Genuine equal protection does not throw half a lifeline to a drowning person, and the same half lifeline, or no rope at all, to a spectator relaxing in a lounge chair.

This is not to suggest that the burden of public costs is itself irrelevant, or that any degree of additional benefit to disabled persons is worth any public cost burden. We certainly need not argue that equal protection requires reducing the overall resources of all other persons to that of the most severely burdened disabled persons. An extreme program of redistribution might undercut work and investment incentives, and might therefore reduce economic growth along with medical and other technological advances, such that even the most severely disabled themselves might then be worse off.¹⁴⁵ We should also consider the value of providing

become disabled, even quite blamelessly, in their mature years have typically had the opportunity to relevantly insure, to form a stable identity, to freely achieve employment goals, and to freely pursue relationships. They are statistically and culturally more nearly normal. Such persons have escaped both death and early disability, and are unlucky only by comparison with the luckiest persons. For a literary example of late and unanticipated disability, see Leo Tolstoy, *The Death of Ivan Ilych*, in *GREAT SHORT WORKS OF LEO TOLSTOY* 245, 302 (Louise & Aylmer Maude trans., Harper & Row, Publishers, Inc. 1967).

¹³⁹ See *supra* notes 69–76 and accompanying text.

¹⁴⁰ See LIACHOWITZ, *supra* note 85, at 9 (“A substantial part of the devaluation, and therefore the disablement of handicapped people can be traced to the American conceptions of individualism and responsibility.”); see also *supra* note 106 and accompanying text. Note also that the employment provisions of the Americans with Disabilities Act can have only limited redressive impact as long as the burden of accommodation remains on individual private employers, rather than the broader taxpaying public.

¹⁴¹ See Wendell, *supra* note 66, at 110 (stating that “[d]isability is also frequently regarded as a personal or family problem rather than a matter for social responsibility”).

¹⁴² See, e.g., Stein, *supra* note 6, at 250.

¹⁴³ See *supra* notes 29–35 and accompanying text.

¹⁴⁴ See Gray, *supra* note 62, at 315 (arguing that historically, the general economic inferiority or subordination of persons with disabilities has been viewed as an ‘inevitable’ consequence of the limits stemming from the disability itself).

¹⁴⁵ See Kavka, *supra* note 96, at 290. Note in particular the huge moral difference in

economic incentives and of allowing for current inequalities that may well indirectly benefit future disabled persons. Certainly, some persons with some forms of disability cannot yet be offered the option of a narrowly medical or technological cure, given the current limits on scientific understanding, whatever other accommodations might be offered.¹⁴⁶ But the options available to severely disabled persons can be changed. We should hardly imagine that the capacities of medicine, engineering, and other technologies should be regarded as fixed and unalterable.

Nor should we focus exclusively on the interests of the disabled in setting limits to redistribution. Beyond some point, which will certainly vary depending upon the type of disability and the state of medical technology, a further transfer of resources to a disabled person may do little or nothing to genuinely improve the circumstances and opportunities of that person¹⁴⁷ and may be enormously¹⁴⁸ or somehow disproportionately¹⁴⁹ costly to the general taxpaying public. At some point, further transfers would, for example, undercut the liberties of the non-disabled more than they would enhance the liberties and opportunities of the recipients. There certainly need be no brutal reduction of the basic liberties and opportunities of the non-disabled.¹⁵⁰

Admittedly, it is not possible to derive some uniquely correct, precise rule limiting such transfers from a general understanding of what equal protection for disabled persons requires.¹⁵¹ However, this unavoidable imprecision is a general fact about principles of justice and morality.¹⁵² It should not be a license to continue

reducing the population of disabled persons by offering at least some the option of non-disability, and in contrast by failing to save the lives of severely disabled persons through medical or technological backwardness. Of course, there is a sense in which a medical breakthrough cure for some, but not all, severe disabilities tends to increase inequality as between those newly curable and those not newly curable. We shall assume that such partial cures are arrived at and made available in a morally unobjectionable way, and that their aggregate primary effect is to increase equality overall.

¹⁴⁶ See Wasserman, *supra* note 22, at 10.

¹⁴⁷ See *id.*

¹⁴⁸ See FRIED, *supra* note 120, at 127; see also Dworkin, *supra* note 97, at 300.

¹⁴⁹ See KYMLICKA, *supra* note 80, at 78 ("Since each additional bit of money might help the severely disadvantaged person, yet is never enough to equalize circumstances fully, we might be required to give all our resources to people with such handicaps, leaving nothing for everyone else.") (citations omitted).

¹⁵⁰ See *id.* at 79–81; see also Dworkin, *supra* note 97, at 301.

¹⁵¹ See Dworkin, *supra* note 97, at 299–301.

¹⁵² See ARISTOTLE, *supra* note 81, at 15. For a somewhat broader pessimism, see JEAN HAMPTON, *POLITICAL PHILOSOPHY* 159 (1997) ("Neither I nor anyone else has a convincing and decisive argument . . . about how to pursue equal treatment in democratic societies . . ."). Presumably this does not mean that all possibilities are equally well-justified, or that the status quo is well or even minimally justified. A degree of uncertainty, applicable to all approaches, hardly

to underrecognize the equal protection rights of blameless persons who have been severely disabled throughout most or all of their lives. All we can or need do is select, on the best grounds we can, any more precise rule from among the best-justified general possibilities. Any precise equal protection rule selected from that set should, on our best arguments, be an improvement over the current constitutional status quo.

Thus, it is certainly not possible, using only an improved general understanding of the relevant principles of equal protection, to say not only that a substantially more generous transfer of resources is appropriate, but that the overall dollar value of the transfer should, in any given case, be one specific figure rather than another. Not all severe disabilities are equally severe. Not all, certainly, are equally costly, if indeed they are costly at all, in medical care. To avoid some of the administrative costs and possible arbitrariness of individualized case-by-case determinations, some standardized but reasonably sensitive categories should be developed. These categories should embody obvious considerations including the timing of the onset of the disability, medical and therapeutic possibilities and costs, other costs of care and accommodation, matters of responsibility, social stigma, unrelievable pain, degrees of freedom and mobility, prognosis, and perhaps the availability of other sources of income if such sources are unusually large. Some balance between a purely individualized, essentially subjective focus and a crude distinction only between severe disability and non-severe disability should be struck, with some gradation or continuum of benefits being awarded.

The crucial point, certainly, is to not allow the inevitable contingencies and imprecision of any such scheme to encourage us to rationalize away the merit of the underlying claims. We do not generally refuse awards to tort victim plaintiffs for future pain and suffering, loss of consortium, humiliation, or lost future income in light of the inevitable speculativeness of such awards.¹⁵³ We know that whatever the best figures are, in cases of severe disability, they are not met by current benefit levels. We could argue otherwise only if we would ourselves be genuinely indifferent to a choice, from the beginning, between a life of severe disability, along with current benefits, and a life without such disability.

exempts the status quo.

¹⁵³ See, e.g., *Lesniak v. County of Bergen*, 563 A.2d 795, 800-05 (N.J. 1989) (stating that determinations of infant plaintiff's lost future earnings, as recoverable in tort action against county, were reasonably probable, though non-quantifiable and therefore utterly imprecise).